

No. 12-715

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In the  
**Supreme Court of the United States**

JAMMIE THOMAS-RASSET,  
*Petitioner,*

v.

CAPITOL RECORDS, INC.; SONY BMG MUSIC  
ENTERTAINMENT; ARISTA RECORDS LLC;  
INTERSCOPE RECORDS; WARNER BROS.  
RECORDS, INC.; AND UMG RECORDINGS, INC.,  
*Respondents.*

**On Petition for Writ of Certiorari to the United  
States Court of Appeals for the Eighth Circuit**

**BRIEF FOR RESPONDENTS IN OPPOSITION**

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## QUESTION PRESENTED

Section 504(c) of the Copyright Act authorizes a copyright owner to recover damages from a copyright infringer “in a sum of not less than \$750 or more than \$30,000 as the court considers just,” or “not more than \$150,000” if “the court finds[] that infringement was committed willfully.” 17 U.S.C. § 504(c). Congress has repeatedly adjusted those statutory ranges, most recently by increasing the maximum awards in part because of the copyright-infringing potential of modern computer technology. Although she denied it and blamed others, Petitioner used file-sharing technology repeatedly to willfully infringe Respondents’ copyrighted sound recordings, illegally downloading those works and then distributing them to millions of others for free. A jury awarded Respondents \$9,250 for each of the 24 works at issue, an award at the low end of the range Congress authorized even for *non*-willful infringement. The Court of Appeals rejected Petitioner’s due process challenge to that award, concluding that it was not “so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.” *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919).

The question presented is:

Whether the Court of Appeals correctly held that the jury’s statutorily authorized award of \$9,250 for each of the 24 copyrighted sound recordings Petitioner willfully infringed is constitutional.

**RULE 29.6 STATEMENT**

Capitol Records, Inc., n/k/a Capitol Records, LLC's ultimate parent corporation is Vivendi S.A., a publicly held French company. Sony BMG Music Entertainment, n/k/a Sony Music Entertainment, is a Delaware general partnership owned by Sony Music Holdings Inc. (98%) and USCO Sub LLC (2%), neither of which is publicly traded. Its ultimate parent corporation is Sony Corporation (Japan), which is publicly traded in the United States. Arista Records LLC is a Delaware limited liability company owned by Arista Music (formerly BMG Music), a New York general partnership, which is not publicly traded. Interscope Records is a subsidiary of Vivendi, S.A., a publicly held French company. Warner Bros. Records, Inc. is indirectly wholly owned by Warner Music Group Corp., a Delaware corporation, which is a wholly owned subsidiary of AI Entertainment Holdings LLC, a Delaware limited liability company, an affiliate of Access Industries, Inc. These entities are not publicly traded. UMG Recordings, Inc.'s ultimate parent corporation is Vivendi S.A., a publicly held French company.

**TABLE OF CONTENTS**

QUESTION PRESENTED ..... i  
RULE 29.6 STATEMENT ..... ii  
TABLE OF AUTHORITIES ..... iv  
OPINIONS BELOW ..... 1  
JURISDICTION ..... 1  
STATEMENT OF THE CASE ..... 1  
    A. Statutory Background ..... 2  
    B. The Peer-to-Peer Network Problem ..... 5  
    C. Proceedings Below ..... 8  
        1. Thomas-Rasset’s Infringement ..... 8  
        2. The First Trial ..... 8  
        3. The Second Trial ..... 11  
        4. The Third Trial ..... 12  
        5. The Court of Appeals ..... 13  
REASONS FOR DENYING THE PETITION ..... 15  
I. The Decision Below Does Not Conflict With  
    Decisions Of This Court Or Other Circuits ..... 16  
II. The Fact-Bound Decision Below Is Correct  
    And Does Not Warrant Review ..... 23  
CONCLUSION ..... 32

## TABLE OF AUTHORITIES

### Cases

<i>A&amp;M Records, Inc. v. Napster, Inc.</i> , 239 F.3d 1004 (9th Cir. 2001) .....	6
<i>Accounting Outsourcing, LLC v. Verizon Wireless Pers. Commc'ns, L.P.</i> , 329 F. Supp. 2d 789 (M.D. La. 2004) .....	17
<i>Atl. Recording Corp. v. Heslep</i> , 2007 WL 1435395 (N.D. Tex. May 16, 2007) .....	7
<i>Bigelow v. RKO Radio Pictures</i> , 327 U.S. 251 (1946) .....	27
<i>BMW of N. Am., Inc. v. Gore</i> , 517 U.S. 559 (1996) .....	14, 20, 22
<i>Capitol Records, Inc. v. Thomas</i> , 2008 WL 5423133 (D. Minn. Dec. 23, 2008) .....	12
<i>Capitol Records, Inc. v. Thomas</i> , 579 F. Supp. 2d 1210 (D. Minn. 2008) .....	11
<i>Capstick v. Allstate Ins. Co.</i> , 998 F.2d 810 (10th Cir. 1993) .....	18
<i>Centerline Equip. Corp. v. Banner Pers. Serv., Inc.</i> , 545 F. Supp. 2d 768 (N.D. Ill. 2008) .....	17
<i>Douglas v. Cunningham</i> , 294 U.S. 207 (1935) .....	22, 25
<i>Eldred v. Ashcroft</i> , 537 U.S. 186 (2003) .....	26
<i>F.W. Woolworth Co. v. Contemporary Arts, Inc.</i> , 344 U.S. 228 (1952) .....	2, 25, 26

<i>Feltner v. Columbia Pictures Television, Inc.</i> , 523 U.S. 340 (1998) .....	4, 29
<i>In re Aimster Copyright Litig.</i> , 334 F.3d 643 (7th Cir. 2003) .....	6
<i>L.A. Westermann Co. v.</i> <i>Dispatch Printing Co.</i> , 249 U.S. 100 (1919) .....	22, 25, 30
<i>Lowry’s Reports, Inc. v. Legg Mason, Inc.</i> , 302 F. Supp. 2d 455 (D. Md. 2004) .....	17
<i>Metro-Goldwyn-Mayer Studios, Inc., v.</i> <i>Grokster Ltd.</i> , 545 U.S. 913 (2005) .....	5, 6
<i>Murray v. GMAC Mortgage Corp.</i> , 434 F.3d 948 (7th Cir. 2006) .....	18
<i>Parker v. Time Warner Entm’t Co.</i> , 331 F.3d 13 (2d Cir. 2003).....	18
<i>Romano v. U-Haul Int’l</i> , 233 F.3d 655 (1st Cir. 2000).....	19
<i>Sony BMG Music Entm’t v. Tenenbaum</i> , 660 F.3d 487 (1st Cir. 2011).....	19, 20, 25
<i>Sony BMG Music Entm’t v. Tenenbaum</i> , 2012 WL 3639053 (D. Mass. Aug. 23, 2012) .....	7, 17, 19
<i>St. Louis, I.M. &amp; S. Ry. Co. v. Williams</i> , 251 U.S. 63 (1919) .....	<i>passim</i>
<i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> , 538 U.S. 408 (2003) .....	18, 20
<i>Texas v. Am. Blastfax, Inc.</i> , 121 F. Supp. 2d 1085 (W.D. Tex. 2000) .....	17

<i>Verizon Cal. Inc. v. OnlineNIC Inc.</i> , 2009 WL 2706393 (N.D. Cal. Aug. 25, 2009) .....	17
<i>Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.</i> , 399 F.3d 224 (3d Cir. 2005).....	17
<i>Zomba Enters., Inc. v. Panorama Records, Inc.</i> , 491 F.3d 574 (2007).....	17
<b>Constitutional Provisions</b>	
U.S. Const. art. 1, § 8 .....	26
<b>Statutes</b>	
17 U.S.C. § 402(d).....	3
17 U.S.C. § 504(b).....	2
17 U.S.C. § 504(c).....	1, 3
Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.....	3
Copyright Act of 1856, ch. 169, 11 Stat. 138.....	29
Copyright Act of 1909, ch. 320, 35 Stat. 1075.....	29
Copyright Act of 1976, Pub. L. No. 94-553, 9 Stat. 2541.....	3
Copyright Act of May 31, 1790, ch. 15, 1 Stat. 124.....	2
Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, 113 Stat. 1774.....	3, 4, 29

**Other Authorities**

25 C.J.S. Damages § 197 .....	21
H.R. Rep. No. 106-216 (1999).....	4, 25, 30
Lev Grossman, <i>It's All Free</i> , Time, May 5, 2003.....	5
Report of the Department of Justice's Task Force on Intellectual Property (October 2004) .....	5, 6
Staff of H. Comm. on the Judiciary, 87th Cong., Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law (Comm. Print 1961) .....	22, 25



## **OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1–22) is reported at 692 F.3d 899. The opinion of the District Court (Pet. App. 23–60) is reported at 799 F. Supp. 2d 999.

## **JURISDICTION**

The Court of Appeals rendered its decision on September 11, 2012. A timely petition for certiorari was filed on December 10, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## **STATEMENT OF THE CASE**

Petitioner Jammie Thomas-Rasset’s copyright infringement was willful in the extreme. Three separate juries have concluded that her blatant and unapologetic violation of Respondents’ rights warranted a substantial award under the Copyright Act’s statutory damages provision. In recognition of the difficulty of proving the precise quantum of actual damages in many copyright cases, that provision authorizes a copyright owner to elect to recover statutory damages from an infringer “in a sum of not less than \$750 or more than \$30,000 as the court considers just,” or “not more than \$150,000” if “the court finds[] that infringement was committed willfully.” 17 U.S.C. § 504(c). In this case, the first jury awarded statutory damages of \$9,250 for each of the 24 works at issue for a total of \$222,000. That award for willful infringement is well within the statutory range—indeed it is less than a third of the statutory maximum for even non-willful infringement—and is the most modest of the three

jury awards. Thomas-Rasset contends not only that this statutorily authorized award is unconstitutional, but that *any* statutory damages award would be unconstitutional in her case. The Court of Appeals correctly applied this Court's settled precedent to reject that remarkable contention and affirm the constitutionality of Congress' and the jury's considered judgment that Respondents are entitled to substantial damages for Petitioner's willful and repeated infringement.

### A. Statutory Background

Rather than impose upon a copyright owner the often difficult or impossible burden of establishing the value of the copyright and the amount of harm caused by the infringement, Congress has long provided that a copyright owner may choose between actual damages or statutory damages as recovery for infringement. *See, e.g.*, Copyright Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 125 (authorizing recovery of "fifty cents for every sheet which shall be found in [the infringer's] possession"). The availability of statutory damages not only obviates the need for difficult or impossible proof, but also deters infringement and ensures appropriate incentives for the creation of copyrighted works. *See F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 232–33 (1952).

In its current form, the Copyright Act provides that, for any act of infringement, the copyright owner may recover either the actual damages suffered plus any additional profits of the infringer, 17 U.S.C. § 504(b), or in the alternative "may elect, at any time before final judgment is rendered, to recover ... an

award of statutory damages,” *id.* § 504(c)(1). The choice belongs exclusively to the copyright owner. A copyright owner is entitled to statutory damages for each work infringed of “not less than \$750 or more than \$30,000 as the court considers just.” *Id.* That baseline range for garden-variety non-willful infringement is subject to two exceptions: If the copyright owner proves that the infringement was willful, the statutory range increases to “not more than \$150,000” per infringed work. *Id.* § 504(c)(2). By contrast, if the infringer proves that he or she “was not aware and had no reason to believe that his or her acts constituted an infringement of copyright,” the award may, in limited circumstances, be reduced to “not less than \$200” per work. *Id.* The innocent infringer exception is not available, however, in cases such as this one where the copyright owners included a copyright notice on the works to which the defendant had access. *Id.* § 402(d).

The damages provision of the Copyright Act has existed in the same basic form since 1976, subject only to amendments to increase both the minimum and maximum amount of statutory damages available. *See* Copyright Act of 1976, Pub. L. No. 94-553, 9 Stat. 2541, 2585 (authorizing minimum damages of \$250, maximum damages of \$10,000, and maximum for willful infringement of \$50,000); Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 10, 102 Stat. 2853, 2860 (increasing minimum to \$500, maximum to \$20,000, and maximum for willful infringement to \$100,000); Digital Theft Deterrence and Copyright Damages Improvement Act of 1999 (“Digital Theft Act”), Pub. L. No. 106-160, § 2, 113 Stat. 1774, 1774 (increasing

minimum to \$750, maximum to \$30,000, and maximum for willful infringement to \$150,000).

Because the Copyright Act's statutory damages provisions refer to the "court," statutory damages were typically awarded by the judge, rather than the jury. In *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), however, this Court held that the Seventh Amendment provides a right to a jury trial on the amount of statutory damages. Although the Court "discern[ed] no statutory right to a jury trial" in the language of section 504(c), it concluded that a statutory damages action is an action at law in which juries have historically had the authority to determine what amount of damages to award. *Id.* at 347, 351–52. Accordingly, the Court held that "the Seventh Amendment provides a right to a jury trial on all issues pertinent to an award of statutory damages under § 504(c) of the Copyright Act, including the amount itself." *Id.* at 355.

Since *Feltner*, Congress has amended section 504(c) without attempting to alter the allocation of authority between judge and jury. Indeed, in the wake of *Feltner*, Congress' only relevant action has been to increase the amount of statutory damages available, thereby substantially increasing the jury's discretion. See Digital Theft Act (increasing minimum to \$750, maximum to \$30,000, and maximum for willful infringement to \$150,000). The legislative history explains that these amendments were designed to provide greater deterrence of copyright infringement in light of new technologies that substantially increase the ease and scale of copying. See H.R. Rep. No. 106-216, at 6 (1999).

## B. The Peer-to-Peer Network Problem

A peer-to-peer network allows an individual computer user to copy and distribute files directly with other users hidden from the view of third parties. Because such networks do not rely on a central service to store shared files, purveyors of peer-to-peer networks, such as Grokster, KaZaA, LimeWire, and iMesh, do not regulate what kind of files are being shared. That absence of oversight turned those networks into a hotbed of copyright infringement, particularly of popular music. *See, e.g., Metro-Goldwyn-Mayer Studios, Inc., v. Grokster Ltd.*, 545 U.S. 913, 940 (2005). Individuals, acting without authorization, would upload copyrighted sound recordings to shared folders on their computers, making the contents of those folders available on peer-to-peer networks for millions of other network users to download. *See, e.g., Lev Grossman, It's All Free*, Time, May 5, 2003. Those other users, in turn, would download the copyrighted music to their own shared folders, thereby making it even more readily available to other peer-to-peer network users. In this way, infringement on peer-to-peer networks is often described as “viral.”

As this Court has recognized, the vicious cycle made possible by peer-to-peer networks resulted in copyright “infringement on a gigantic scale.” *Grokster*, 545 U.S. at 940. In 2004, the Department of Justice concluded that peer-to-peer networks were “one of the greatest emerging threats to intellectual property ownership.” Report of the Department of Justice’s Task Force on Intellectual Property 39 (October 2004). It estimated that “millions of users

access P2P networks,” and that “the vast majority” of those users “illegally distribute copyrighted materials through the networks.” *Id.*; see also *Grokster*, 545 U.S. at 923 (users employed peer-to-peer networks “primarily to download copyrighted files”).

This massive copyright infringement has had a devastating effect on the recording industry. When the effect first became apparent, Respondents and other members of the recording industry joined similarly affected industries in seeking to address the problem by suing the proprietors of the peer-to-peer networks. Although those efforts succeeded in establishing that use of peer-to-peer networks to share copyrighted files constitutes unlawful copyright infringement, see, e.g., *Grokster*, 545 U.S. at 940; *In re Aimster Copyright Litig.*, 334 F.3d 643, 654–55 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022–24 (9th Cir. 2001), repeated holdings to that effect did little to deter individual users. Instead, many individuals persisted in their infringing conduct, migrating from one peer-to-peer network to another as networks were shut down or converted to legitimate services operating in compliance with copyright law, while remaining “disdainful of copyright and in any event discount[ing] the likelihood of being sued or prosecuted for copyright infringement.” *In re Aimster*, 334 F.3d at 645. Accordingly, in 2002, the recording companies reluctantly decided to commence an enforcement program designed to identify and pursue individuals who were unlawfully using peer-to-peer networks to distribute copyrighted sound recordings.

To do this, the recording companies engaged a firm, MediaSentry, to gather evidence of infringement associated with users identified by their Internet Protocol (“IP”) addresses. To perform this task, MediaSentry searched peer-to-peer networks for users distributing infringing files for download and gathered evidence concerning that infringement, including the IP address of each user. Once those IP addresses had been captured, the recording companies commenced “Doe” actions for copyright infringement against the individuals responsible for the IP addresses. They then used the discovery process to obtain records from Internet service providers (“ISPs”) identifying these individuals. *See Atl. Recording Corp. v. Heslep*, 2007 WL 1435395, at \*1–\*3 (N.D. Tex. May 16, 2007) (detailing industry’s enforcement program). After obtaining that information, recording companies routinely offered, and individuals typically accepted, the option of settling the matters for relatively low amounts. If the case could not be settled, the recording companies proceeded with an individual lawsuit against the owner of the IP address. The present case is one of only two actions that proceeded to jury trial.<sup>1</sup>

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<sup>1</sup> The other case is currently on appeal to the First Circuit after the District Court recently rejected a constitutional challenge very similar to the one pressed here. *See Sony BMG Music Entm’t v. Tenenbaum*, 2012 WL 3639053 (D. Mass. Aug. 23, 2012). This Court denied an interlocutory petition for certiorari in *Tenenbaum* last Term. *See Tenenbaum v. Sony BMG Music Entm’t, cert. denied*, 132 S. Ct. 2431 (2012).

## **C. Proceedings Below**

### **1. Thomas-Rasset's Infringement**

In 2005, Respondents acquired evidence from MediaSentry that a KaZaA account with the username “tereastarr@kazaa.com” was distributing more than 1,700 copyrighted sound recordings, including the 24 works at issue in this case, to other KaZaA users. MediaSentry immediately sent an instant message to the “tereastarr” account informing that the accountholder had been caught distributing copyrighted works and that such conduct was illegal and must stop. After tracing the account to an IP address provided by Charter Communications, Respondents filed a Doe suit and learned from Charter in response to a subpoena that the address was assigned to Thomas-Rasset. Respondents sent Thomas-Rasset a letter informing her that she had illegally infringed their copyrights and inviting her to contact them about settling the matter. Thomas-Rasset contacted Respondents but repeatedly denied that the KaZaA account was hers, and the matter ultimately proceeded to litigation and trial on 24 of Respondents' copyrighted works. Pet. App. 5–6.

### **2. The First Trial**

Despite acknowledging that she had used the username “tereastarr” previously on other accounts, Thomas-Rasset persisted in denying responsibility for the infringement. Respondents produced substantial evidence confirming that the “tereastarr@kazaa.com” account belonged to Thomas-Rasset. Respondents' witnesses explained in detail



how they traced the illegal file-sharing back to the account and IP address assigned to Thomas-Rasset. Respondents' evidence showed that the files in the account holder's shared folder were not authorized copies, but were instead likely illegally downloaded from other KaZaA users. Respondents further demonstrated that the "tereastarr" account made all 1,700 files, including the 24 works at issue, available to millions of other KaZaA users to download illegally, which MediaSentry confirmed by downloading a portion of each file. And Respondents proved that, although Thomas-Rasset volunteered her hard drive for forensic analysis as proof that she had never used KaZaA, the analysis revealed that it was *not* the hard drive Thomas-Rasset was using when MediaSentry detected the infringement, but was instead a replacement she obtained *after* MediaSentry sent the instant message informing the "tereastarr" account holder that infringement had been detected. Pet. App. 5–7.

Notwithstanding this overwhelming evidence, Thomas-Rasset denied responsibility while simultaneously conceding much of the most damaging evidence against her. She did not deny that the IP address traced to the "tereastarr@kazaa.com" account was hers, or that "tereastarr" is a username she created and regularly uses for all sorts of accounts. She also conceded that the hard drive she supplied to Respondents was not the hard drive she had at the time of the alleged infringement, and blamed her earlier representations to the contrary on faulty memory. And she admitted familiarity with an eclectic collection of dozens of artists and works found in the "tereastarr" account's shared folder. In

addition, Thomas-Rasset admitted that she studied Napster in detail in college and wrote a case study concluding that Napster was legal, but also knew Napster was subsequently shut down for illegal copyright infringement. Nonetheless, she not only denied that the “tereastarr@kazaa.com” account was hers, but claimed she had never even heard of KaZaA or any file-sharing program other than Napster before this case. Pet. App. 6–7.

In addition to the mountain of evidence establishing Thomas-Rasset’s liability for willful infringement, Respondents also adduced substantial evidence of the significant damage that illegal file-sharing has caused them. Respondents’ witnesses explained that the injury is not simply a matter of the illegal copies that any individual file-sharer makes, but is a product of the viral distribution of those illegal copies that peer-to-peer networks make possible, which, in turn, diminishes the value of Respondents’ copyrights. They explained how the massive scale of this unauthorized distribution has cost recording companies billions in profits, caused substantial job loss within the industry, and dramatically decreased the number of artists they represent. Pet. App. 18.

At the close of evidence, the District Court instructed the jury that Thomas-Rasset could be found liable for infringement if she reproduced or distributed Plaintiffs’ works, but did not instruct the jury to specify the basis for any infringement finding. The court also instructed that “making sound recordings available for distribution on a peer-to-peer network violates a copyright owners’ exclusive right

to distribution, ‘regardless of whether actual distribution has been shown.’” Pet. App. 8. The jury found Thomas-Rasset liable for willful infringement and awarded statutory damages of \$9,250 per work, at the low end of the range authorized for *non*-willful infringement, for a total of \$222,000.

While post-trial briefing was ongoing, the District Court *sua sponte* requested additional briefing on whether its instruction that making works available on peer-to-peer networks constitutes unauthorized distribution was erroneous. After supplemental briefing and a hearing, the District Court concluded that the instruction was reversible error and vacated the jury’s verdicts and ordered a new trial. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008).

### **3. The Second Trial**

At the second trial, Thomas-Rasset continued to deny that the “tereastarr@kazaa.com” account was hers, but this time also testified that her young children and former boyfriend might be the culprits. Pet. App. 9. Even without the “making available” instruction, the second jury once again found Thomas-Rasset liable for willful infringement and awarded Respondents \$80,000 per work, toward the middle of the range authorized for willful infringement, for a total of \$1,920,000.

Thomas-Rasset filed a post-trial motion arguing that any statutory damages award would be unconstitutional in her case, but alternatively that the jury’s within-range award should be reduced under either a remittitur analysis or the Due Process

Clause. The District Court declined to rule on the constitutional issue and instead remitted damages to \$2,250 per work, which is three times the statutory *minimum* for infringement, for a total of \$54,000. See *Capitol Records, Inc. v. Thomas*, 2008 WL 5423133 (D. Minn. Dec. 23, 2008). Notably, the District Court essentially concluded that this sum was the highest amount that could ever be awarded in a case such as this. Respondents declined the remittitur and exercised their right to a new trial, explaining that they could not accept a remittitur ruling that purported to set a new and dramatically lower statutory maximum for every case involving an individual file-sharer.

#### **4. The Third Trial**

Since Thomas-Rasset's liability for willful infringement had been established in the second trial, the only question before the third jury was what amount of statutory damages to award. Accordingly, Respondents' evidence focused on the harm Thomas-Rasset's conduct caused. Respondents' witnesses testified that file-sharing not only deprived them of sales but also devalued both the copyrights at issue and copyrighted sound recordings as a whole, leading to massive lay-offs within the industry. They testified that the cost of a license to engage in Petitioner's conduct—*i.e.*, to copy and distribute any and all works in a company's catalog—would be tantamount to the value of the company itself. They also explained that file-sharing has contributed to a significant decline in the number of artists Respondents represent and the number of albums they have released, effecting both a corporate and a

societal cost. Finally, they detailed how Thomas-Rasset repeatedly lied about her file-sharing and attempted to cover up her illegal infringement, and explained the need for strong deterrence against similar actions by Thomas-Rasset and other would-be infringers. 8th Cir. Opening Br. of Appellants/Cross-Appellees 19–20. The third jury awarded Respondents \$62,500 per work, in the bottom half of the range authorized for willful infringement, for a total of \$1,500,000.

Thomas-Rasset filed a post-trial motion, again arguing that any statutory damages award would be unconstitutional, but alternatively that the award should be reduced under the Due Process Clause. This time, she did not ask the court to consider remittitur. The District Court granted Thomas-Rasset’s motion and reduced the award to \$2,250 per work, deeming that the maximum constitutionally permissible award. Pet. App. 23–60.

### **5. The Court of Appeals**

Both parties appealed. Respondents argued that the District Court erred by concluding that its “making available” instruction at the first trial was erroneous, and also by concluding that the juries’ statutorily authorized damages awards violated the Due Process Clause. Accordingly, Respondents asked the Court of Appeals to reinstate the first jury’s award of \$9,250 per work, which the District Court had vacated based on its “making available” ruling. For her part, Thomas-Rasset appealed the District Court’s decision to award \$2,250 per work on the ground that the Constitution forbids *any* statutory damages award here. She also declined to defend the

District Court’s “making available” ruling and acquiesced in Respondents’ request to reinstate the first jury’s award, subject to her constitutional challenge.

The Court of Appeals reversed, accepting the parties’ request to reinstate the first jury’s award and holding that award constitutional. Pet. App. 1–22. The court agreed with Respondents that the constitutionality of a statutory damages award should be analyzed under the deferential standard this Court established in *St. Louis, I.M. & S. Railway Company v. Williams*, 251 U.S. 63 (1919), rather than under the three “guideposts” the Court established for review of punitive damages awards in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). The court explained that the “fair notice” concern animating the *Gore* guideposts “does not apply to statutory damages, because those damages are identified and constrained by the authorizing statute.” Pet. App. 16.

Applying the deferential *Williams* standard, the court concluded that the jury’s \$9,250-per-work award was “not ‘so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.’” Pet. App. 17 (quoting *Williams*, 251 U.S. at 67). Emphasizing that the award “is toward the lower end of th[e] broad range” Congress set, the court concluded that, “[a]s in *Williams*, ‘the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to [federal law]’ support the constitutionality of the award.” Pet. App. 17 (quoting *Williams*, 251 U.S. at 67). In particular, the court

highlighted the “important public interest” copyright protection serves and “the serious problem posed by online copyright infringement,” and also noted that “Congress was well aware of the threat of noncommercial copyright infringement when it established the lower end of the [damages] range.” Pet. App. 17–19. In light of those and other factors, the court held the jury’s within-range award constitutional.

### **REASONS FOR DENYING THE PETITION**

The decision below is correct and does not conflict with the decisions of this Court or any other Court of Appeals. It is a fact-bound application of a due process standard that this Court established long ago. Nearly a century ago, the Court concluded that a statutory damages award comports with the Due Process Clause so long as it “cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.” *Williams*, 251 U.S. at 67. Contrary to Thomas-Rasset’s contention, the circuits are not divided on whether that highly deferential standard continues to govern constitutional review of statutory damages awards. Only one other Court of Appeals has resolved that question, and it agreed with the court below that the *Williams* standard, not the *Gore* guideposts for review of unbounded punitive damages awards, applies. That conclusion is correct and does not warrant this Court’s review.

Nor is there any need for the Court to review the Eighth Circuit’s fact-bound application of that standard. Although the petition largely glosses over the nature of Petitioner’s conduct and her efforts at

denial and deflecting blame, her infringement was willful in the extreme. The Court of Appeals correctly concluded that both Congress' judgment as reflected in the Copyright Act's statutory damages provision and the jury's judgment after considering all the evidence are an appropriate and reasonable response to "the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to" copyright law. *Id.* Petitioner's attempts to demonstrate otherwise distort the law and the facts. Her core legal argument is squarely foreclosed by *Williams*, which emphatically rejected the notion that a statutory damages award should be measured against the amount of injury the wrongful conduct caused. Even were that not the case, the record below provides ample evidence of the very real harm her willful infringement caused, and confirms that the jury's award responds to *that* harm, not the harms caused by file-sharing writ large. In short, there is no reason to disturb the jury's statutorily authorized award, and certainly no reason to consider Petitioner's remarkable argument that the Constitution somehow relieves her from *any* financial consequences for her willful copyright infringement.

**I. The Decision Below Does Not Conflict With Decisions Of This Court Or Other Circuits.**

Contrary to Thomas-Rasset's contention, the Courts of Appeals are not divided on what standard to apply when deciding whether a damages award within a range authorized by statute is constitutional. In fact, the only two circuits that have addressed the issue directly—the Eighth Circuit



in this case and the Sixth Circuit in *Zomba Enterprises, Inc. v. Panorama Records, Inc.*, 491 F.3d 574 (2007)—both concluded that statutory damages awards should be reviewed under the deferential standard established in *Williams*, not the *Gore* guideposts that govern review of punitive damages awards. See Pet. App. 15–17; *Zomba Enters.*, 491 F.3d at 586–88.<sup>2</sup>

Thomas-Rasset’s assertion that the First, Second, Third, Seventh, and Tenth Circuits have reached a different conclusion is misleading and wrong. Two of the cases she cites do not involve statutory damages awards in the relevant sense—*i.e.*, damages awards within a statutorily authorized range—but instead involve the same kind of uncapped punitive damages awards at issue in *Gore*. See *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 228 n.1 (3d Cir. 2005) (holding

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<sup>2</sup> A number of District Courts, including the court in this case, have reached the same conclusion. See, e.g., Pet. App. 31–35; *Tenenbaum*, 2012 WL 3639053, at \*5–\*6; *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 459–60 (D. Md. 2004) (holding that *Gore* and *Campbell* do not apply to statutory damages awards under Copyright Act); *Centerline Equip. Corp. v. Banner Pers. Serv., Inc.*, 545 F. Supp. 2d 768, 777–78 (N.D. Ill. 2008) (applying *Williams* to reject due process challenge to statutory damages provision of Telephone Consumer Protection Act); *Accounting Outsourcing, LLC v. Verizon Wireless Pers. Commc’ns, L.P.*, 329 F. Supp. 2d 789, 808–09 (M.D. La. 2004) (same); *Texas v. Am. Blastfax, Inc.*, 121 F. Supp. 2d 1085, 1090–91 (W.D. Tex. 2000) (same); *Verizon Cal. Inc. v. OnlineNIC Inc.*, 2009 WL 2706393, at \*6–\*7 (N.D. Cal. Aug. 25, 2009) (applying *Williams* to uphold statutory damages award under Anticybersquatting Consumer Protection Act).

constitutional punitive damages award under statute authorizing such damages with no cap); *Capstick v. Allstate Ins. Co.*, 998 F.2d 810, 817 (10th Cir. 1993) (holding constitutional punitive damages award under statute that capped damages in certain circumstances but not those at hand).<sup>3</sup>

Two more do not involve damages awards *at all*. *Parker v. Time Warner Entertainment Co.*, 331 F.3d 13 (2d Cir. 2003), involved an interlocutory class certification question under a statute that authorized statutory damages. While the court cited *Gore* and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), for the proposition that “the due process clause might be invoked” to challenge the amount of any ultimate damages award, it explicitly “decline[d] to consider what limits the due process clause may impose,” noting that any such “concerns remain[ed] hypothetical” at that point. *Parker*, 331 F.3d at 22. *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006), likewise involved an interlocutory class certification question under a statute that authorized statutory damages, and likewise cited *Campbell* only for the dictum proposition that an “unconstitutionally excessive” damages award “may be reduced.” *Id.* at 954.

The sole case Thomas-Rasset cites that actually involves application of the *Gore* guideposts to a

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<sup>3</sup> Even if *Capstick* had involved a statutory damages award, the Tenth Circuit could hardly have applied “*Gore* and its progeny,” Pet. 22 n.14, given that *Capstick* was decided three years before *Gore*.

statutorily capped damages award is *Romano v. U-Haul International*, 233 F.3d 655, 672–74 (1st Cir. 2000). But *Romano* does not establish the split she alleges, as neither the court nor the parties made any mention of *Williams* or whether its more deferential standard should govern the due process analysis—which is not surprising since the case involved a statutory cap on punitive damages, not the kind of statutory damages the Copyright Act authorizes.

Moreover, any argument that *Romano* established that *Gore* and not *Williams* applies to statutory damages awards in the First Circuit cannot be squared with the First Circuit’s subsequent and far more apposite decision in *Sony BMG Music Entertainment v. Tenenbaum*, 660 F.3d 487 (1st Cir. 2011). There, in confronting an excessiveness challenge to a statutory damage award under the Copyright Act in a file-sharing case, the First Circuit implicitly rejected the argument that *Romano* dictated that the *Gore* factors applied, and instead strongly suggested that the deferential *Williams* standard should govern review of statutory damages awards under the Copyright Act. *See id.* at 512–13. At a minimum, it made clear that the question remained open in the First Circuit. On remand from that decision, the District Court recently concluded that *Williams*, not *Gore*, does indeed govern, and applied it to uphold against constitutional attack an award of \$22,500 per work against an individual who, like Thomas-Rasset, willfully and unapologetically used file-sharing technology to infringe copyrighted sound recordings. *Sony BMG Music Entm’t v. Tenenbaum*, 2012 WL 3639053, at \*5–\*6 (D. Mass. Aug. 23, 2012). As noted, *see supra*

n.1, that decision and is currently back on appeal, *see Sony BMG Music Entm't v. Tenenbaum*, No. 12-2146 (1st Cir.), which makes review of any purported disagreement between the Eighth and First Circuits' approaches to statutory damages awards premature.

In any event, there is little reason to think the split Petitioner alleges will materialize, as courts are manifestly correct in concluding that *Williams*, not *Gore*, governs in this context. That is because, as both courts below explained, the *Gore* guideposts "would be nonsensical if applied to statutory damages." Pet. App. 16–17; *see also* Pet. App. 34 ("the *Gore* guideposts themselves cannot be logically applied to this award"). Those guideposts are motivated by two concerns: the unbounded nature of punitive damages and the resulting lack of notice. *See Gore*, 517 U.S. at 574 (emphasizing principle "that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose"). Those concerns "are simply not present in a statutory damages case where the statute itself provides notice of the scope of the potential award." *Tenenbaum*, 660 F.3d at 513.

For that reason, the punitive damages guideposts make little sense when imported into the statutory damages context. The first *Gore* factor, reprehensibility, accounts for the fact that punitive damages are usually awarded under the common law, where there is no legislative determination of the public interest in preventing the offense, let alone a legislative quantification of the appropriate range of penalties. *See Campbell*, 538 U.S. at 419

(instructing courts to consider factors such as whether conduct caused physical or economic harm, involved indifference to health or safety of others, targeted the vulnerable, was isolated or repeated, and involved intentional malice, trickery, or deceit). In a statutory damages scheme, by contrast, Congress has already weighed the relevant factors and determined how reprehensible the conduct is, so there is no need for a court to ask that question in the first instance. When Congress has made the judgment, the judicial task is more modest: The court's role is limited to reviewing the rationality of Congress' judgment. Recognizing as much, *Williams* instructs courts to examine the reasonableness of *Congress'* determination, giving great deference to its assessment of "the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to" law. *Williams*, 251 U.S. at 67.

The second *Gore* guidepost, which measures the disparity between the punitive damages award and the actual or potential harm caused, is similarly incompatible with a statutory damages scheme. Punitive damages awards punish defendants as an adjunct to a case in which the amount of compensatory damages has already been established. *See* 25 C.J.S. Damages § 197. In that context, a requirement that the punitive damages award be proportionate to the degree of underlying injury makes sense, and the compensatory award provides a ready yardstick. Statutory damages, by contrast, are awarded in lieu of, not in addition to, compensatory damages. Indeed, Congress typically authorizes statutory damages precisely because, as in the

copyright context, actual damages would be “difficult or impossible” to prove. *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935); *see also* Staff of H. Comm. on the Judiciary, 87th Cong., Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 102 (Comm. Print 1961) (“1961 Report”) (“The value of a copyright is, b[y] its nature, difficult to establish, and the loss caused by an infringement is equally hard to determine.”). It would undermine such schemes to measure their constitutionality against something Congress has determined the plaintiff need not prove precisely because doing so often would be impracticable or impossible. *See L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 106 (1919) (“[t]he fact that [statutory] damages are to be ‘in lieu of actual damages’ shows that something other than actual damages is intended”).

The third *Gore* guidepost—comparing a punitive damages award to authorized civil penalties—is, if anything, an even worse fit because a statutory damages award *is* an authorized civil penalty. To the extent the third guidepost is designed to ensure that damages awards are measured with “substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue,” *Gore*, 517 U.S. at 583 (internal quotation marks omitted), that feat can be accomplished for a statutory damages award by examining the statute itself. And to the extent it is intended to determine whether the defendant had fair notice of potential liability, *see id.* at 584, that too can be established by resort to the statute. Thus, in a statutory damages case, there is simply no work for the third *Gore* guidepost to do.

In sum, the only two Courts of Appeals to address directly the question Thomas-Rasset asks this Court to consider have correctly concluded that the deferential *Williams* standard, not the *Gore* guideposts, governs constitutional review of statutory damages awards. Accordingly, the petition identifies no conflict with the decisions of this Court or of other Courts of Appeals in need of resolution.

## **II. The Fact-Bound Decision Below Is Correct And Does Not Warrant Review.**

Nor is there any reason for this Court to disturb the Court of Appeals' fact-bound application of the *Williams* standard to this case. Contrary to what Petitioner's question presented might suggest, the court did not hold (and Respondents did not argue) that statutory damages awards need not satisfy any due process analysis. Rather, after considering the strong public interest in preventing widespread willful file-sharing, the countless opportunities file-sharing presents for copyright infringement, the need to secure adherence to copyright laws, and the particularly blameworthy conduct of Thomas-Rasset, the court concluded that the jury's award satisfies the due process analysis prescribed by this Court in *Williams*. In other words, the award—which is well below what Congress has authorized even for *non*-willful infringement—is constitutional because it “cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.” *Williams*, 251 U.S. at 67. That conclusion is both decidedly fact-bound and manifestly correct. It does not remotely warrant this Court's review. Thomas-Rasset's arguments to the contrary

are wholly divorced from both the law and the facts of this case.

1. At the outset, this Court has conclusively rejected Thomas-Rasset’s core argument that the Constitution requires statutory damages to “be confined or proportioned to [the plaintiff’s] loss or damages,” *id.* at 66. *See* Pet. 24. In affirming an award 113 times larger than actual damages, the *Williams* Court recognized that when a statutory damages award “is contrasted with the [actual damages] possible in any instance it of course seems large.” *Williams*, 251 U.S. at 67 (affirming \$75 award for \$0.66 overcharge). But the Court admonished that “its validity *is not to be tested in that way*,” as “the Legislature may adjust [the award’s] amount to the public wrong rather than the private injury.” *Id.* at 66–67 (emphasis added). Instead, the relevant question is whether, when “considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates,” the award “can[] be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.” *Id.* at 67.

That focus on the nature of the defendant’s wrong, rather than the extent of the plaintiff’s injury, carries particular force in the copyright context, where Congress authorized statutory damages for the express purpose of *relieving* a plaintiff of the burden of quantifying actual injury caused by infringement. One of the driving forces behind Congress’ adoption and retention of statutory



damages for infringement has been its desire to compensate for “the acknowledged inadequacy of actual damages and profits in many cases,” which results because “actual damages are often conjectural, and may be impossible or prohibitively expensive to prove.” 1961 Report 102; *see also Tenenbaum*, 660 F.3d at 502 (“Section 504’s text reflects Congress’s intent ‘to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits.’” (quoting *Douglas*, 294 U.S. at 209)). And Congress has specifically sought to ensure that “the cost of infringement substantially exceeds the costs of compliance, so that persons who use or distribute intellectual property have a strong incentive to abide by the copyright laws.” H.R. Rep. 106–216, at 6.

In keeping with that understanding, this Court has repeatedly and emphatically made clear that a statutory damages award for copyright infringement requires no proof of or relationship to actual damages. *See L.A. Westermann*, 249 U.S. at 106 (holding plaintiff entitled to statutory damages where no evidence of actual damages was presented); *Douglas*, 294 U.S. at 208 (reversing where lower court reduced damages award from statutory maximum to statutory minimum on ground that no actual damages were proven); *F.W. Woolworth*, 344 U.S. at 231 (affirming statutory maximum award where proven damages were significantly lower). In doing so, the Court has expressly validated Congress’ determination that copyright infringement is *always* against the public interest and should *always* be deterred, and that “a rule of liability which merely takes away the profits

from an infringement would offer little discouragement to infringers [and] would fall short of an effective sanction for enforcement of the copyright policy.” *Id.* at 233.

As the foregoing illustrates, to suggest there is something unconstitutional about statutory damages awards that are substantially greater than the quantifiable harm copyright infringement causes would be to suggest not only that copyright infringement law has been constitutionally suspect for more than a century, but also that this fact has repeatedly escaped this Court’s notice. Quite the contrary, the Court has expressly recognized and affirmed the reasonableness of Congress’ judgment that “[e]ven for uninjurious and unprofitable invasions of copyright [a] court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy.” *Id.* That determination reflects the Court’s due deference to the fact that the Constitution tasks *Congress* with establishing copyright policy, *see* U.S. Const. art. 1, § 8, and that courts “are not at liberty to second-guess congressional determinations and policy judgments” in this arena. *Eldred v. Ashcroft*, 537 U.S. 186, 208 (2003).

2. Even were the Court inclined to consider introducing an actual damages comparison into the statutory damages context, this would be a particularly poor case in which to do so because the record confirms that Thomas-Rasset’s actions did in fact cause substantial (if not precisely quantifiable) harm. Respondents presented ample evidence that “Thomas-Rasset acted willfully, failed to take

responsibility, and contributed to the great harm to the recording industry inflicted by online piracy in general” by illegally downloading their works and making them available to millions of other peer-to-peer network users for free. Pet. App. 45. She does not deny as much, but instead simply insists she should escape any consequences for her willful infringement because Respondents cannot identify the exact amount of injury she caused or prove that someone else would not have caused the same injury if she had not. See Pet. 10. That extraordinary argument is at odds with our most basic legal traditions.

To be sure, the nature of Thomas-Rasset’ conduct and the technology she employed made it difficult to pinpoint the precise quantum of harm attributable to her. But it has long been settled that a defendant cannot grant herself immunity by making damages difficult to measure. See, e.g., *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946) (“The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.”). What matters is that the record confirms Thomas-Rasset repeatedly engaged in conduct that caused Respondents significant harm, and the jury’s low-end award of \$9,250 per work is an appropriate reflection of both her blatant disregard for the law and the very real injuries to which she contributed.

Thomas-Rasset does no better with her repeated insistence that the jury’s award reflects “the injury caused by file-sharing in general,” Pet. 15, rather than the nature of *her* conduct and the harm *she*

caused. Certainly, one relevant metric of the harm Thomas-Rasset's own individual conduct inflicted is what Respondents would charge for a license to engage lawfully in Thomas-Rasset's own individual conduct—*i.e.*, taking the two dozen works on which Respondents sued (and another 1,700 more) and essentially putting them in the public domain by making them available to be freely copied by all. Respondents made clear that the price for such a copyright-destroying license would approach the value of their entire companies, for it is impossible to compete with free. 8th Cir. Opening Br. of Appellants/Cross-Appellees 19, 53. Petitioner counters that such testimony ignores that others were engaging in the same conduct, but that argument is both misdirected (it is an argument for the jury—and one that the jury both heard and rejected) and misguided (for the price to engage in such copyright destruction would be the same for all).

In all events, the District Court instructed the jury to base its damages assessment on factors specific to Thomas-Rasset, including “the willfulness of the defendant’s conduct, the defendant’s innocence, the defendant’s continuation of infringement after notice or knowledge of the copyright or in reckless disregard of the copyright, effect of the defendant’s prior or concurrent copyright infringement activity, and whether profit or gain was established.” Dist. Ct. Doc. 97 at 25 (Jury Instruction No. 22). Those factors not only provided the jury with more than sufficient guidance as to how to exercise the broad discretion the Copyright Act grants, but also ensured that the jury would not punish Thomas-Rasset “for the harm inflicted on the recording industry by file sharing in

general.” Pet. 21. Indeed, had the jury really assessed statutory damages based on the billions of dollars that file-sharing in the aggregate has cost the industry, rather than the small portion of that injury attributable to Thomas-Rasset, the award would have had to have been astronomically larger.

Nor is Thomas-Rasset correct to suggest (at 13–14) that this Court should second-guess the award because a jury rather than a judge determined the “just” level of damages. Review under *Williams* should involve deference to both the policy judgments of Congress and the jury’s role as reaffirmed in *Feltner*. Juries have been entrusted with awarding statutory damages in copyright infringement cases for hundreds of years. *Feltner*, 523 U.S. at 351–52. Although Congress may not originally have envisioned that juries would award damages under section 504(c), if Congress thought juries were not up to the task, it presumably would have circumscribed the jury’s role, not expanded the jury’s discretion by expanding the damages range when it amended section 504(c) one year after *Feltner*. See Digital Theft Act.<sup>4</sup>

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<sup>4</sup> Thomas-Rasset’s assertion (at 13) that section 504(c)’s discretionary statutory damages range is unique to the 1976 Copyright Act is mistaken. The 1909 act authorized “just” damages of not less than \$250 and not more than \$5,000 for nearly all types of infringement, Copyright Act of 1909, ch. 320, § 25(b), 35 Stat. 1075, 1081, and the 1856 act authorized “just” damages of “not less than one hundred dollars for the first, and fifty dollars for every subsequent performance” of a copyrighted work. Copyright Act of 1856, ch. 169, 11 Stat. 138, 139; see also *Feltner*, 523 U.S. at 351 (citing early Massachusetts and Rhode

The concerns animating Congress' decision to expand that discretion also doom Thomas-Rasset's argument (at 17–18) that there is no public interest to vindicate when an individual uses file-sharing technology to illegally download and distribute copyrighted works. When Congress increased the statutory limits on copyright damages in 1999, it explained that it did so to provide a “significant deterrent” against the “additional incentive” that the rapidly expanding use of the Internet would provide “for copyright thieves to steal protected works.” H.R. Rep. No. 106-216, at 3. And Congress specifically emphasized its intent to reach ordinary “computer users [who] are either ignorant that copyright laws apply to Internet activity, or ... simply believe that they will not be caught or prosecuted for their conduct.” *Id.* Accordingly, there is no merit to Thomas-Rasset's suggestion that the jury's award within—indeed, near the low end of—the range Congress authorized does not reflect “the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to” copyright law. *Williams*, 251 U.S. at 67.

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Island copyright statutes authorizing damages between £5 and £3,000 and New Hampshire statute authorizing damages between £5 and £1,000). Although Congress has periodically increased the amount of damages available, “the principle on which [it] proceeded—that of committing the amount of damages to be recovered to the court's discretion and sense of justice, subject to prescribed limitations—[has been] retained.” *L.A. Westermann*, 249 U.S. at 107.

At bottom, Thomas-Rasset's problem is not so much with the Eighth Circuit's legal analysis as with Congress' considered judgment that her infringement should be subject to significant statutory damages, and with Respondents' decision to vindicate the rights Congress has seen fit to give them. Whatever the merits of Thomas-Rasset's policy arguments, they have no bearing on the Court of Appeals correct conclusion that the jury's statutorily authorized damages award is well within whatever bounds the Due Process Clause may set.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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